

APPEAL NO. 030396
FILED APRIL 10, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 9, 2003. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) did not sustain a compensable injury on (alleged date of injury); that the claimant has not had disability; and that the respondent (carrier) did not waive its right to dispute the compensability of the claimant's claimed lower back injury because the carrier timely contested compensability of the claimant's lower back injury in accordance with Sections 409.021 and 409.022. The claimant appealed the hearing officer's determinations on all of the disputed issues and the carrier responded.

DECISION

Affirmed.

The claimant had the burden to prove that he sustained a compensable injury as defined by Section 401.011(10) and that he had disability as defined by Section 401.011(16). Conflicting evidence was presented on the issue of whether the claimant sustained a compensable injury on (alleged date of injury). The claimant testified that he injured his lower back on (alleged date of injury), while lifting boxes at work. The claimant's supervisor testified that the claimant told him on (alleged date of injury), that he had had back pain the night before at home and that he had not been hurt at work. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer found that the claimant was not injured in the course and scope of his employment on (alleged date of injury), and concluded that the claimant did not sustain a compensable injury on (alleged date of injury). Although there is conflicting evidence in this case, we conclude that the hearing officer's determination that the claimant did not sustain a compensable injury on (alleged date of injury), is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). The hearing officer did not err in determining that the claimant has not had disability because, without a compensable injury, the claimant would not have disability as defined by Section 401.011(16).

With regard to the issue of whether the carrier waived its right to contest the compensability of the claimant's claimed injury, the evidence reflects that on July 15, 2002, the employer completed an Employer's First Report of Injury or Illness (TWCC-1), in which the employer noted a date of injury of _____, and the type of injury as a back injury, and that it sent the TWCC-21 to the carrier on July 15, 2002. In a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated July 16, 2002, which was received by the Texas Workers' Compensation Commission (Commission) on July 16, 2002, the carrier reported that it first received written notice of

a claimed back injury of _____, on July 15, 2002, and certified that benefits would be paid as accrued. The hearing officer found that the first TWCC-21 filed by the carrier in which it certified that benefits would be paid as accrued was filed with the Commission within seven days of the carrier's first written notice of a claimed back injury.

In a TWCC-21 dated July 26, 2002, which was date stamped as filed with the Commission on July 29, 2002, the carrier again noted that it first received written notice of the claimant's claimed back injury of _____, on July 15, 2002, and in this TWCC-21 disputed that the injury occurred in the course and scope of the claimant's employment. Thus, the TWCC-21 dated July 26, 2002, was filed within 60 days of the carrier's first written notice of a claimed back injury.

The hearing officer determined that the carrier did not waive its right to dispute the compensability of the claimant's claimed lower back injury because the carrier timely contested the compensability of the claimant's lower back injury in accordance with Sections 409.021 and 409.022. See Texas Workers' Compensation Commission Appeal No. 022375-s, decided October 31, 2002.

The claimant contends that the carrier waived its right to contest the compensability of the claimed lower back injury of (alleged date of injury), because the carrier did not file with the Commission a TWCC-21 disputing the compensability of a (alleged date of injury), injury until October 4, 2002.

While the claimant testified that he had back pain at work on _____, when he bent over and fell, the claimant states in his appeal that he has never claimed that he was injured on _____, and that the employer created that information. The claimant also contends that although the carrier had notice of a correct date of injury of (alleged date of injury), from the claimant's recorded statement of July 22, 2002, and the claimant's attorney's letter of July 22, 2002, it failed to dispute a (alleged date of injury), injury until October 4, 2002.

Since the claimant specifically denies any claimed work-related injury occurring on _____, we are dealing with only one claimed lower back injury; that is the asserted lower back injury of (alleged date of injury). Apparently, there was confusion on the part of the employer as to what the date of the claimed injury was because the claimant's supervisor made a written report on (alleged date of injury), in which he reported that the claimant told him on that day that he had had back pain at home and that the back pain was not work related. When the employer filed the TWCC-1 with the carrier it used a _____, date of injury, having previously been informed by the claimant that he was not injured at work on (alleged date of injury). The carrier then used the _____, date of injury in the first TWCC-21 (agreeing to pay benefits as they accrue), which was filed with the Commission within seven days of its first written notice of injury, and in its second TWCC-21 (disputing injury in the course and scope of employment), which was filed within 60 days of its first written notice of injury. Under these circumstances, we cannot agree that the hearing officer erred in

determining that the carrier did not waive its right to contest compensability of the claimed injury, that is, a claimed lower back injury. See Texas Workers' Compensation Commission Appeal No. 012629, decided December 10, 2001, where the carrier stated "unknown" for the date of injury in its TWCC-21 because of the confusion with regard to what date of injury was being alleged.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Robert W. Potts
Appeals Judge

CONCUR:

Daniel R. Barry
Appeals Judge

Chris Cowan
Appeals Judge